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No. 80-

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SELCO SUPPLY COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the timely filing of an authorized motion for reconsideration of orders of the United States Environmental Protection Agency toll the time for filing a notice of appeal in the court of appeals?

2. When a petitioner has filed a notice of appeal from an order of the United States Environmental Protection Agency, may the jurisdiction of the court of appeals thereafter be defeated as prematurely invoked if, without prejudice to any party, the petitioner does not file a new notice of appeal, or seek to amend the pending petition, after a subsequent post-final-order ruling by the Agency?

CORPORATE AFFILIATES

Selco Supply Company has no parent, affiliate or subsidiary corporation.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Selco Supply Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on October 20, 1980.

OPINION BELOW

The opinion of the court of appeals is reported at 632 F.2d 863 and appears herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 20, 1980. The instant

petition for a writ of certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136n (1976) and 40 C.F.R. § 168.70 (1980) appear herein as Appendix B.

STATEMENT OF THE CASE

In May 1977 the Environmental Protection Agency ("EPA") brought a civil penalty assessment action against the Selco Supply Company ("Selco") for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (1976), which regulates the transportation, sale, and use of pesticides. EPA charged that in January and February, 1975 Selco violated an Agency order suspending certain uses of products containing heptachlor and chlordane.

An Administrative Law Judge heard the matter on stipulated facts and issued an Initial Decision against Selco on September 8, 1978. On September 25, 1978 Selco filed a timely motion to reopen the hearing to take additional evidence, as authorized by EPA's Rules of Practice, 40 C.F.R. § 168.70(b) (1980). Selco stated in its motion that the suspension order at issue had not been served on Selco but rather on a law firm without authority to represent the company. Because EPA's Rules of Practice specifically authorized continued agency review of Selco's claim, the company believed that this motion tolled the time for filing an administrative appeal of the Initial Decision with the Regional Administrator.

Six months later, on March 19, 1979, the Regional Administrator signed a ruling denying Selco's motion to reopen the enforcement proceeding. Furthermore, in the same document the Regional Administrator also issued his final order in the matter, assessing a $15,000 civil penalty against Selco. This action effectively foreclosed Selco's right to an administrative appeal as contemplated by EPA's Rules. *See* 40 C.F.R. § 168.51 (a) (1980). The Regional Administrator's opinion was docketed by the Regional Hearing Clerk on March 22, 1979. The Hearing Clerk served the parties by mail sent out on March 26, 1979. Selco received the order on March 27, 1979.

In an attempt to rectify within the agency process the improper denial of Selco's right to appeal the Initial Decision, Selco filed a motion for reconsideration of the Final Order on April 4, 1979. Such a motion is expressly permitted by the EPA Rules of Practice. *See* 40 C.F.R. § 168.70(c) (1980). Once again, because the Regional Administrator's order could not be final until he considered Selco's motion for reconsideration, Selco believed that its motion tolled the time for filing a notice of appeal in the court of appeals.

Nevertheless, in view of the Regional Administrator's prior actions, Selco filed a notice of appeal in the Tenth Circuit Court of Appeals on May 24, 1979, pursuant to 7 U.S.C. § 136n(b). This appeal was filed within the sixty-day period from the date the order was available to the public, allowing three days for service by mail. *See* 40 C.F.R. § 168.07(c) (1980). On July 9, 1979, the Regional Administrator denied the motion to reconsider his Final Order. Thereafter, Selco did not file a new notice of appeal or seek to amend the pending petition.

By decision dated October 20, 1980, the Tenth Circuit Court of Appeals dismissed the Selco petition for review. The majority ruled that, in the absence of a specific statutory provision to the contrary, a motion for reconsideration does not toll the limitation period within which a notice of appeal must be filed. (App. A, pp. 2a-3a). The court of appeals also stated that even if tolling were permitted, Selco's May 24, 1979 petition would be premature. (*Id.* at p. 4a)

REASONS FOR GRANTING THE WRIT

I. This case presents an important question concerning the procedural rights of interested parties to judicial review of actions taken by the Environmental Protection Agency. It also involves significant questions of judicial economy and efficiency at a time when the resources of the federal courts are taxed to the limit. In their decision a majority of the Tenth Circuit departed from established principles of federal administrative law and held that the timely filing of a motion for reconsideration of a final EPA order does not toll the sixty-day period provided for seeking review of that order in the court of appeals. (*Id.* at p. 3a). The court below dismissed the contrary decisions of this Court and the other circuits, stating that Congress intended a more expedited review of orders under environmental protection statutes than under other federal laws. (*Id.* at pp. 3a-4a). The majority concluded that, in light of that policy, the time for seeking judicial review of EPA orders is tolled by a motion for reconsideration only when the applicable statute expressly so provides. Because FIFRA is silent on the question, the court held that Selco's motion was

irrelevant to the limitation period, and hence that Selco's May 24, 1979 notice of appeal was filed out of time. (*Id.*).

The Tenth Circuit's decision was erroneous as a matter of fact because, as noted above, the petition was filed within the sixty-day appeal period. *See supra* at 3. In addition, the decision of the majority below was erroneous as a matter of law. In the leading case of *Outland* v. *CAB,* 284 F.2d 224 (D.C. Cir. 1960) (Burger, J.), the District of Columbia Circuit addressed the identical question of whether a petition for rehearing changed the time from which judicial review must be sought. There, as here, the applicable statute contained a sixty-day limitation period but was silent with respect to the effect of motions for reconsideration. *See* 49 U.S.C. § 1486(a) (1976). The court in *Outland* held that "when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon . . . ." *Id.* at 228. The court noted that this rule was supported by important considerations of efficiency and judicial economy. A request for rehearing by definition may lead to modification or reversal of the order complained of so as to make judicial review unnecessary. The court found that it would be wasteful to require parties seeking administrative reconsideration also to file "protective" petitions for review that may become moot or irrelevant once the final agency decision is made. *Id.* at 227-28.

The *Outland* decision has been approved specifically by this Court. In *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970), for example, the Court stated that "[u]nless Congress provides otherwise, '[w]here a motion for rehearing is in fact filed

there is no final action until the rehearing is denied.' " *Id.* at 541 (citing *Outland*); *see CAB* v. *Delta Air Lines,* 367 U.S. 316, 326 (1961). Similarly, the *Outland* rule has been followed by every circuit other than the Tenth that has had occasion to consider the question, *see, e.g., ECEE, Inc.* v. *FERC,* 611 F.2d 554, 557 (5th Cir. 1980); *New York* v. *United States,* 568 F.2d 887, 892-93 (2d Cir. 1977); *Tiger International, Inc.* v. *CAB,* 554 F.2d 926, 931 n.10 (9th Cir. 1977); *B. J. McAdams, Inc.* v. *ICC,* 551 F.2d 1112, 1115 (8th Cir. 1977); *Samuel B. Franklin & Co.* v. *SEC,* 290 F.2d 719, 724-25 (9th Cir. 1961), and has been reaffirmed by the District of Columbia Circuit itself, *see, e.g., Pennsylvania* v. *ICC,* 590 F.2d 1187, 1193-96 (D.C. Cir. 1978); *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147, 151 (D.C. Cir. 1961).

The majority below did not make any rational attempt to explain why the general rule in favor of tolling should not be applied in this case. It merely stated that decisions under other statutes "are not pertinent," and that "[p]rompt resolution of EPA orders under FIFRA, like orders made under other environmental protection statutes, should be made promptly." (App. A, pp. 3a-4a). However, as Judge Seymour stated in his concurring opinion rejecting the majority's argument on this point, "it is not self-evident that there is a lesser need for a quick determination of issues before" other federal agencies than before EPA. (*Id.* at p. 7a). The majority cited nothing in either FIFRA or its legislative history to justify a departure from established administrative procedure in this case.*

* In any event, civil penalty assessment cases are distinguishable from other environmental protection proceedings, such as those

The decision below sets a serious and detrimental precedent, not merely for EPA enforcement actions and environmental protection proceedings in general, but also for judicial review of all federal agency orders. If the majority's holding is permitted to stand, parties can be expected to revive the practice of filing "protective" notices of appeal whenever a petition for reconsideration is pending. They will do so because they will be unable to predict whether the court of appeals subsequently will find that an underlying statute requires "prompt resolution" of agency orders and hence that the sixty-day period for seeking judicial review was not tolled. Such "protective" petitions would be no less wasteful and no less inefficient today than they were at the time of the *Outland* decision. Selco respectfully submits that the Court should take this opportunity to revise a ruling that undercuts the administrative review process as designed by Congress and further burdens the courts of appeal and this Court. As one court correctly has noted, "[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts . . . ." *Pennsylvania* v. *ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978).

II. This case raises a second significant procedural issue with respect to judicial review of administrative orders. Assuming that the Tenth Circuit erred in de-

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involving rulemaking, registration, suspension, or cancellation. Civil penalty cases generally are based on violations alleged to have taken place long before EPA files its complaint. As a result, urgency in correcting a potentially harmful condition is not a consideration. At minimum, then, the court below was not justified in finding that environmental cases *per se* require overriding established due process standards that protect individual respondents from arbitrary administrative action.

parting from the general rule of *Outland,* it could be argued that the notice of appeal filed by Selco on May 24, 1979 was premature insofar as the Regional Administrator had not yet ruled on Selco's motion for reconsideration. The question then is whether that notice of appeal was nevertheless sufficient given the Administrator's subsequent summary denial of Selco's motion, or whether Selco should have undertaken the technical formality of refiling its notice of appeal, or filing an amendment to that notice.

The circuit courts of appeal have divided sharply over the equities inherent in this question. Some, including the Tenth Circuit below (App. A, p. 4a), prefer a highly formalistic approach to the requirement of a notice of appeal. These courts have held that under no circumstances may a premature notice of appeal sustain jurisdiction. *See Century Laminating, Ltd.* v. *Montgomery,* 595 F.2d 563, 567-68 (10th Cir.), *cert. dismissed,* 444 U.S. 987 (1979); *Keith* v. *Newcourt, Inc.,* 530 F.2d 826 (8th Cir. 1976).

The majority of circuits, however, have preferred a narrow exception to the rule against premature petitions for review. In the context of an administrative review proceeding, this exception would apply only in the limited situation in which a notice of appeal is filed between the pronouncement of an agency order and entry of that order, or while a motion to amend or reconsider a final order is pending. These courts have argued that such a notice of appeal should be treated as valid, even though technically premature, provided two conditions are met: 1) the order entered after the filing of the notice of appeal must not change the substance of the order against which the appeal

was directed (for example, a motion to amend must have been denied); and 2) there must have been no prejudice to other parties. *See Jackson* v. *Tennessee Valley Authority,* 595 F.2d 1120, 1121 (6th Cir. 1979); *Yaretsky* v. *Blum,* 592 F.2d 65, 66-67 (2d Cir. 1979); *Plummer* v. *United States,* 580 F.2d 72, 74 (3d Cir. 1978); *Richerson* v. *Jones,* 551 F.2d 918, 922-23 (3d Cir. 1977); *Dougherty* v. *Harper's Magazine Co.,* 537 F.2d 758, 762 (3d Cir. 1976); *Stokes* v. *Peyton's Inc.,* 508 F.2d 1287, 1288 (5th Cir. 1975); *Song Jook Suh* v. *Rosenburg,* 437 F.2d 1098, 1101 (9th Cir. 1971); *Eason* v. *Dickson,* 390 F.2d 585, 588 (9th Cir.), *cert. denied,* 392 U.S. 914 (1968). *See also* 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3915, at 599-600 (1976).

Such an exception is based on principles of justice, economy, and convenience. As Selco argued below, no useful purpose is served by requiring a party to go to the trouble and expense of refiling essentially the same notice of appeal from essentially the same order. In the instant case, for example, the Regional Administrator's denial of the motion for reconsideration left standing the original Final Order from which Selco had appealed. The Government had notice of the objections of Selco to that Order. No prejudice would have arisen had the Tenth Circuit acted on the basis of the May 24, 1979 petition for review. Instead, however, Selco itself was prejudiced. Petitioner's right to an appeal, already infringed upon by the confusing response to its motion for reconsideration as discussed above, was denied altogether.

Selco respectfully requests that the Court resolve this ambiguity with respect to an essential element

of appellate jurisdiction. There is an important need to settle this disagreement to avoid further prejudice to parties that will find themselves facing Selco's dilemma in the future. In doing so, the Court will clarify the rights and duties of parties seeking judicial review of orders of all administrative agencies.

CONCLUSION

Although this matter comes to the Court on a Petition for Writ of Certiorari, we believe the injustice that has been done can be remedied without full briefing and argument. It is respectfully submitted that if the Court is of a similar view, the matter should be remanded to the Tenth Circuit for action not inconsistent with the decisions in *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970) and *Outland* v. *CAB,* 284 F.2d 224 (D.C. Cir. 1960).

For the reasons set forth herein, if the Court believes a remand is not appropriate we respectfully request that a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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Dated January 19, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1443

SELCO SUPPLY COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

(Filed, United States Court of Appeals, Tenth Circuit, Oct. 20, 1980, Howard K. Phillips, Clerk)

John P. Donley for Petitioner.

F. Patrick Barry (James W. Moorman, Assistant Attorney General, Angus Macbeth, Deputy Assistant Attorney General, Donald W. Stever, Jr. and Nancy Long, Attorneys, Department of Justice and John C. Ulfelder and Ruthanne Miller, Environmental Protection Agency, with him on the briefs) for Respondent.

Before SETH, BREITENSTEIN and SEYMOUR, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Petitioner, Selco Supply Company, seeks review of orders of the Environmental Protection Agency, EPA. We dismiss because the petition was not filed within the time provided by the statute and, hence, the court of appeals is without jurisdiction.

The case arises under the Federal Insecticide, Fungicide and Rodenticide Act, FIFRA, 7 U.S.C. § 136 *et seq.*, which

regulates the sale, transportation, and use of pesticides. The Act requires registration of pesticides with the EPA. In November, 1974, EPA gave notice of intent to cancel registrations of pesticides containing heptachlor and chlordane. Selco responded to a suspension notice. In December, 1975, EPA suspended some, but not all, use of products containing heptachlor and chlordane, and a month later clarified that order. In 1977 EPA began administrative enforcement proceedings against Selco by filing a complaint charging violations of the suspension order. On September 8, 1978, an Administrative Law Judge, ALJ, rejected the Selco claim that it had not received notice of the suspension order, found that Selco had violated that order, and assessed a $15,000 penalty against it. Selco did not appeal the decision of the ALJ but filed a motion to reopen on the ground that the suspension order was not served on Selco but on a law firm that was not authorized to represent it. On March 19, 1979, the EPA Regional Administrator denied the Selco motion to reopen and assessed a $15,000 civil penalty against Selco. On April 4, 1979, Selco filed a motion for reconsideration of the March 19 order and on May 24, 1979, filed the pending petition seeking review of both the September 8, 1978, and March 19, 1979 EPA orders. EPA denied the motion to reconsider on July 9, 1979. Selco did not petition for review of the July 9 order.

FIFRA provides, 7 U.S.C. § 136n(b), that "* * * any person * * * may obtain judicial review of [an EPA order] by filing in the United States Court of Appeals * * * within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part."

The grant of exclusive jurisdiction in the court of appeals is intended to insure prompt resolution of the validity of EPA orders. *See Environmental Defense Fund, Inc.* v. *Environmental Protection Agency,* D.C.Cir., 485 F.2d 780, 783. The time limits for judicial review of actions taken under environmental protection statutes provide a statute

of limitations which bars late filings. *See Sun Enterprises, Ltd.* v. *Train,* 2 Cir., 532 F.2d 280, 290-291 (Clean Water Act) and *Oljato Chapter of Navajo Tribe* v. *Train,* D.C. Cir., 515 F.2d 654, 661 (Clean Air Act).

Selco's May 24, 1979 petition sought review of the EPA September 8, 1978 order which had been entered over 250 days before and of the March 19, 1979 order which had been entered 66 days before. As to the last order Selco says that the time should run from the date of service of the order on it.

Selco points out that EPA regulation, 40 C.F.R. § 168.70 (c), permits a petition for reconsideration to be filed within 10 days after the date of service of the final order and that under *Id.* § 168.60(c)(1) judicial review of an order assessing a civil penalty must be sought within 60 days after service of the order on the respondent. The difficulty is that the statute, 7 U.S.C. § 136n(b), requires that a petition for judicial review be filed within 60 days after the entry of the order, and contains no provision for tolling by a motion for reconsideration. Federal courts may exercise only that judicial power provided by the Constitution and conferred by Congress. *See Powell* v. *McCormack,* 395 U.S. 486, 512-513, and *Baker* v. *Carr,* 369 U.S. 186, 198-199. For a regulation to be valid it must be consistent with the statute under which it is promulgated. *United States* v. *Larionoff,* 431 U.S. 864, 873.

We are convinced that the statute applies and precludes review when the petition is not filed within the prescribed 60 day period from the entry of the order. Decisions under other federal statutes permitting tolling of the limitation period are not pertinent. *See e.g., B. J. McAdams, Inc.* v. *Interstate Commerce Commission,* 8 Cir., 551 F.2d 1112, 1115 (Interstate Commerce Act) and *Samuel B. Franklin & Co.* v. *Securities and Exchange Commission,* 9 Cir., 290 F.2d 719, 725 (Securities and Exchange Act). Prompt resolution of EPA orders under FIFRA, like orders under

other environmental protection statutes, should be made promptly.

Even if tolling is permitted, the court of appeals is without jurisdiction because then the final order would be the July 9 order denying the motion for reconsideration and Selco has presented no petition for the review of that order. The May 24 petition for review was premature. We have held that a premature notice of appeal is insufficient to sustain jurisdiction of the court of appeals when no notice of appeal has been filed for review of a final judgment of a federal district court. *Century Laminating, Ltd.* v. *Montgomery,* 10 Cir., 595 F.2d 563, 568-569. The same principle applies to review of action of an administrative agency. The present action is barred by the failure to comply with the jurisdictional requirements.

Petition dismissed.

SEYMOUR, Circuit Judge, concurring:

I agree this action is barred by Selco's failure to comply with jurisdictional requirements. However, I take issue with the majority's conclusion that a petition for reconsideration does not alter the time for filing an appeal.

The majority's interpretation rests upon the requirement in 7 U.S.C. § 136n(b) that a notice of appeal be filed within sixty days after entry of the EPA's final order. The holding emphasizes that an EPA regulation rather than the language of the statute itself provides for a reconsideration petition.[1] These considerations are not controlling. In *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), the issue was whether a petition for rehearing before the Civil Aeronautics Board changed the time from which judicial review must be sought. The statute there, 49 U.S.C. § 1486(a), contained a sixty-day limitations period and had no provision regarding motions for reconsideration. The court held that "when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board." *Id.* at 228. The Supreme Court cited this very language in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970), where it held that an order by the ICC was not so final as to bar the Commission's later reopening of the record. *See also CAB v. Delta Air Lines*, 367 U.S. 316, 326 (1961).

Significant policy reasons dictate that judicial review not precede an administrative agency's resolution of a motion to reconsider its decision:

> "[W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review

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[1] The Administrator of the EPA clearly possessed the authority to pass such regulation. *See* 7 U.S.C. § 136w(a)(1).

> unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result . . . has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this: the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date."

Outland v. CAB, 284 F.2d at 227-28. "It is in the interest of judicial economy and agency responsibility to allow [a] Commission to reconsider its orders . . . , rather than to compel an applicant to invoke immediate judicial review." *B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 (8th Cir. 1977).

In those instances where a statute or a regulation provides for agency reconsideration, courts have held that a motion for reconsideration delays the time for seeking judicial review until the agency has acted upon the motion. *See ECEE, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980); *Pennsylvania v. ICC*, 590 F.2d 1187, 1193 (D.C. Cir. 1978); *Tiger International, Inc. v. CAB*, 554 F.2d 926, 931 n. 10 (9th Cir. 1977); *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); *Samuel B. Franklin & Co.* v. *SEC*, 290 F.2d 719, 725 (9th Cir. 1961). *See also New York v. United States*, 568 F.2d 887, 892-93 (2d Cir. 1977); *B. J. McAdams, Inc. v. ICC*, 551 F.2d at 1114-15. *Cf. Laminators Safety Glass Association v. Consumer Product Safety Commission*, 578 F.2d 406, 410-11 (D.C. Cir. 1978) (recognizing general rule but holding petition for reconsideration does not delay time for appeal where

neither statute nor regulation provides for reconsideration).

Prompt resolution of environmental orders is an important goal. It is not self-evident, however, that there is a lesser need for a quick determination of issues before the Federal Energy Regulatory Commission, the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and the Securities and Exchange Commission. The previously cited cases demonstrate that motions for reconsideration submitted to those agencies have been held to delay the running of the time for judicial appeal until the motion has been decided. In light of the strong policies and precedent favoring such delay, I think it unadvisable for this court to create a contrary rule for EPA orders decided under FIFRA.

The majority correctly states that if Selco's petition for reconsideration delayed the start of the sixty-day filing period, its notice of appeal was premature. It is for this reason, rather than the lateness in filing, that I would hold the present action untimely filed.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. § 136n

§ 136n.

(a) District court review.—Except as is otherwise provided in this subchapter, Agency refusals to cancel or suspend registrations or change classifications not following a hearing and other final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts.

(b) Review by court of appeals.—In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or any officer designated by him for that purpose, and thereupon the Administrator shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The court shall consider all evidence of record. The order of the Administrator shall be sustained if it is supported by substantial evidence when considered on the record as a whole. The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. The commencement of proceedings under this section shall not,

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unless specifically ordered by the court to the contrary, operate as a stay of an order. The court shall advance on the docket and expedite the disposition of all cases filed therein pursuant to this section.

(c) Jurisdiction of district courts.—The district courts of the United States are vested with jurisdiction specifically to enforce and to prevent and restrain violations of, this subchapter.

(d) Notice of judgments.—The Administrator shall, by publication in such manner as he may prescribe, give notice of all judgments entered in actions instituted under the authority of this subchapter.

40 C.F.R. § 168.70

§ 168.70 Motion to reopen hearings; to rehear or reargue proceedings; or to reconsider a final order.

(a) *Filing and service.* A motion to reopen a hearing to take further evidence, to rehear or reargue any matter related to such proceeding, or to reconsider any final order, must be made by motion to the Regional Administrator, in accordance with § 168.32(a), and filed with the Regional Hearing Clerk. Every such motion must state the specific grounds upon which relief is sought.

(b) *Motion to reopen hearing.* A motion to reopen a hearing for the purpose of taking further evidence may be filed at any time after the service of the initial decision of the Administrative Law Judge and prior to the issuance of the Regional Administrator's final order. Each such motion shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not cumulative, and shall set forth a good reason why such evidence was not adduced at a hearing.

(c) *Motion to rehear, reargue, or reconsider.* Motions to rehear or reargue any matter related to a hearing or to

reconsider the final order shall be filed within ten (10) days after the date of service of the final order. Every such motion must state specifically the matters claimed to have been erroneously decided. The nature of any alleged error must be briefly stated.

No. 80-1245

In the Supreme Court of the United States

OCTOBER TERM, 1980

SELCO SUPPLY COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed a petition for review filed 66 days after a final order was entered by the Environmental Protection Agency, when jurisdiction is limited by statute, 7 U.S.C. 136n(b), to those petitions filed within 60 days of entry of a final order.

2. Whether a petition for judicial review of a final order filed prior to disposition of a motion for reconsideration by the agency confers jurisdiction on the court of appeals to review the final order when the motion for reconsideration is subsequently denied.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 632 F. 2d 863.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1980. The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

Section 16(b) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136n(b), and 40 C.F.R. 168.70 (1979),[1] are set forth in Pet. App. B.

STATEMENT

1. This case arises under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, a comprehensive regulatory statute governing the sale, use, and distribution of pesticides. As a part of the regulatory scheme established under the Act, the Administrator of the Environmental Protection Agency (EPA) has the authority to register a pesticide for use, sale, or distribution upon a determination that the pesticide will "perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5)(C). The Administrator may cancel or suspend the registration of a pesticide upon a finding that the pesticide in question no longer meets the criteria for registration. 7 U.S.C. 136d. The registrant has a

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[1] Petitioner cites to the 1980 edition of Title 40 of the Code of Federal Regulations in referring to Part 168 of Title 40, which contained the applicable procedures in effect when the instant dispute arose. Part 168 does not appear in the 1980 edition of Title 40, because it was revoked on April 9, 1980, and replaced with consolidated rules governing the assessment of civil penalties under a number of statutes administered by the Environmental Protection Agency. 45 Fed. Reg. 24363 (1980). We therefore will cite to the 1979 edition of Title 40 of the Code of Federal Regulations.

continuing burden of demonstrating that its product is entitled to registration. *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 548 F. 2d 998, 1012-1018 (D.C. Cir. 1976); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 510 F. 2d 1292, 1297 (D.C. Cir. 1975); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 465 F. 2d 528, 532 (D.C. Cir. 1972).

Any person who violates an order for cancellation or suspension issued pursuant to 7 U.S.C. 136d is subject to criminal or civil penalties. 7 U.S.C. 136j(a)(2)(J); 7 U.S.C. 136*l*. Civil penalties are assessed administratively by EPA, following hearing, upon a finding that there has been a violation of the order cancelling or suspending the registration of a product. 7 U.S.C. 136*l*(a)(1) and (3). An order of the Administrator issued under FIFRA, including an order assessing a civil penalty, is reviewable in the court of appeals for the circuit wherein the person adversely affected by the order resides or has a place of business. 7 U.S.C. 136n(b). Review must be sought in the court of appeals "within 60 days after entry of such order." *Ibid.*

2. On December 24, 1975, after a full hearing at which petitioner was represented by counsel, the Administrator of EPA issued an order suspending registrations for some, but not all, of the uses of the pesticides heptachlor and chlordane. The Administrative Law Judge (ALJ) in the instant case found that a copy of the Administrator's suspension decision and order was mailed to petitioner, one of the registrants of these pesticides, but that petitioner had no record of having received the decision and order.

Subsequently, after two inspections of petitioner's premises, EPA determined that petitioner had sold certain formulas of the pesticides heptachlor and chlordane that had been banned by the Administrator's December 24, 1975 order of suspension. On May 5, 1977, administrative

enforcement proceedings were initiated against petitioner for these violations. A principal component of petitioner's defense was that it did not receive notice of the Administrator's suspension order.

On September 8, 1978, the ALJ issued his initial decision finding petitioner in violation of the suspension order and assessing a civil penalty against petitioner in the amount of $15,000. The ALJ found clear and convincing evidence that petitioner was represented by counsel in the suspension proceedings and concluded that counsel's receipt of the Administrator's suspension order constituted sufficient notice to petitioner. In any event, the ALJ concluded that petitioner itself could be held to have received notice of the suspension by virtue of a presumption that the notice mailed directly to it was in fact received. Petitioner did not file an administrative appeal from the decision of the ALJ, as it was authorized by regulation to do. See 40 C.F.R. 168.51 (1979). Under 40 C.F.R. 168.46(c) (1979), an initial decision of an ALJ that was not appealed to the Regional Administrator became the "final order" of the Regional Administrator after the passage of 30 days.

On September 25, 1978, petitioner filed a motion to reopen the preceedings before the ALJ, pursuant to 40 C.F.R. 168.70(b) (1979), for the purpose of taking further evidence on the question whether it was in fact represented by the counsel who appeared in the suspension proceedings. On March 19, 1979, the Regional Administrator of EPA denied petitioner's motion to reopen,[2] concluding that the evidence about petitioner's relationship with counsel who appeared in the suspension proceedings should have been presented to the ALJ who assessed the civil penalty for

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[2]Under the regulations, a motion to reopen was to be directed to the Regional Administrator, not the ALJ who first heard the case. 40 C.F.R. 168.70(a) (1979).

violating the suspension order and that the additional evidence would, at all events, be cumulative. See 40 C.F.R. 168.70(b) (1979). On the same date, the Regional Administrator also entered a final order concurring in the ALJ's assessment of the civil penalty.

On April 6, 1979, petitioner filed a motion pursuant to 40 C.F.R. 168.70(c) (1979), requesting the Regional Administrator to reconsider his entry of the final order. In this motion to reconsider, petitioner stated that it believed its motion of September 25, 1978 to reopen the proceedings before the ALJ tolled the time allowed under 40 C.F.R. 168.51 (1979) for filing a formal appeal to the Regional Administrator from the ALJ's decision. While the motion to reconsider was pending before the Regional Administrator, petitioner, on May 24, 1979, filed a petition in the United States Court of Appeals for the Tenth Circuit pursuant to 7 U.S.C. 136n(b) seeking review of the ALJ's September 8, 1978 decision and the Regional Administrator's order of March 19, 1979. See Pet. App. 2a. Petitioner's motion to reconsider subsequently was denied by the Regional Administrator on July 9, 1979. The Regional Administrator observed in his July 9 decision that, under 40 C.F.R. 168.46(c) (1979), the initial decision of the ALJ became final 30 days after it was issued, because petitioner did not appeal from that decision and the Regional Administrator did not elect, sua sponte, to review it. In the Regional Administrator's view, the March 19, 1979, order denying petitioner's motion to reopen the hearing before the ALJ merely "formalized" the order that had previously become final when petitioner did not take an appeal from the ALJ's decision. The Regional Administrator therefore denied petitioner's April 6 motion and "affirmed" the final order of March 19, 1979. Petitioner did not file a petition for review in the court of appeals following the July 9, 1979 denial of its motion for reconsideration by EPA.

3. The court of appeals dismissed the petition for review, concluding that the 60-day period within which a party may file a petition for review in the court of appeals under 7 U.S.C. 136n(b) is a "statute of limitations which bars late filings" (Pet. App. 2a-3a). Because petitioner's petition was filed 250 days after entry of the ALJ's decision of September 8, 1978, and 66 days after the Regional Administrator's order of March 19, 1979, the court of appeals held that it was without jurisdiction to entertain the petition. Pet. App. 3a. In addition, the court held that, even if petitioner's motion to reconsider filed on April 6, 1979, had tolled the running of the 60-day period, the petition for review filed in the court of appeals on May 24, 1979 was "premature" because EPA had not yet denied the motion to reconsider. Accordingly, the court of appeals held that the petition could not confer jurisdiction. Pet. App. 4a.

Judge Seymour concurred in the holding that the court was without jurisdiction because the petition for review filed in the court of appeals was premature, but she concluded that the April 6, 1979 motion to reconsider filed with EPA tolled the running of the 60-day period for seeking judicial review (Pet. App. 5a-6a).

ARGUMENT

This case presents no issue warranting review by this Court, particularly because the procedural regulations that governed this case are no longer in effect. See note 1, *supra*.

1. Section 16(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136n(b), provides in pertinent part:

> * * * [A]ny person * * * may obtain judicial review [of an order] by filing in the United States court of appeals * * * within 60 days after entry of such order, a petition praying that the order be set aside in whole or in part * * *.

Petitioner's petition for review, filed in the court of appeals on May 24, 1979, sought review of the ALJ's decision of September 8, 1978, and the Regional Administrator's order of March 19, 1979. The petition for review was filed more than 250 days after entry of the former and 66 days after entry of the latter. Thus, as to each, the petition for review was filed beyond the period of 60 days from entry of the order permitted under 7 U.S.C. 136n(b). Hence, the petition failed to confer jurisdiction upon the court of appeals, and the court of appeals properly dismissed the petition.

FIFRA is similar to other environmental protection statutes in providing a limited time within which review of EPA actions may be sought in the court of appeals. Compare 42 U.S.C. (Supp. II) 7607(b) (60-day period under the Clean Air Act); 33 U.S.C. 1369 (90-day period under the Clean Water Act). Congress' purpose in providing a limited time for invoking the exclusive jurisdiction of the courts of appeals to review actions of EPA was to insure prompt resolution of the validity of such actions and thereby to effectuate the environmental purpose of the statutes. See *Peabody Coal Co.* v. *Train*, 518 F. 2d 940, 942 (6th Cir. 1975); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 485 F. 2d 780, 783 (D.C. Cir. 1973). In interpreting the Clean Air Act and Clean Water Act, the courts uniformly have held that the time limit bars late filings. *Sun Enterprises Ltd.* v. *Train*, 532 F. 2d 280, 290-291 (2d Cir. 1977); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F. 2d 654, 661 (D.C. Cir. 1975); *Peabody Coal Co.* v. *Train*, *supra*, 518 F. 2d at 942. The same rule should be followed here.

2. Petitioner suggests (Pet. 3, 5), however, that the 60-day period within which a petition for review must be filed in the court of appeals should run either from the date of service of the EPA order (March 26, 1979) or from the date on which the order was docketed by the Regional

Hearing Clerk (March 22, 1979), allowing three additional days for service of the order by mail. If either of these dates were utilized, petitioner's petition for review would have been timely filed in the court of appeals, at least insofar as it sought review of the March 19, 1979, order denying the motion to reopen proceedings before the ALJ. However, both of petitioner's suggested approaches must be rejected because each is flatly inconsistent with the explicit statutory language in 7 U.S.C. 136n(b) that a petition for review must be filed "within 60 days after the *entry* of [the] order" (emphasis added). Compare Fed. R. App. P. 4(a) (notice of appeal in a civil case must be filed with the clerk of the district court within 30 days of the date of the entry of the judgment). The statute makes no reference to when the order is served on the parties, nor does it allow for extension of the 60-day period for an additional three days merely because a copy of the order is sent to the parties by mail.[3] See also *Peabody Coal Co.* v. *Train*, *supra*, 518 F. 2d at 942.

3.a Petitioner argues, however, that its filing of a motion for reconsideration on April 6, 1979, tolled the time for filing a petition for review in the court of appeals and that its petition for review filed on May 24, 1979, therefore was timely (Pet. 4-7). The court of appeals rejected this argument. It reasoned that Congress' evident concern that "resolution of EPA orders under FIFRA, like orders under

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[3]The court of appeals stated (Pet. App. 3a) that 40 C.F.R. 168.60(c)(1) (1979) permitted a party to seek judicial review within 60 days after service of the order, but it concluded that the regulation could not alter the plain language of the statute, which requires a petition for review to be filed within 60 days of when the order was entered. The court of appeals misread the regulation: it provided only that payment of a civil penalty shall be made within 60 days of service of the final order upon the party. The regulation did not purport to grant a party 60 days from the date of service within which to file a petition for review. For good reason, then, petitioner does not rely on 40 C.F.R. 168.60(c)(1) (1979) in arguing that its petition for review was timely.

other environmental protection statutes, should be made promptly" militated against extending the time for filing a petition for review in the court of appeals merely because a motion for reconsideration has been filed with the agency. Pet. App. 3a-4a.

Relying on cases arising under other statutes, however, petitioner argues that the Tenth Circuit's decision in this case is in conflict with other decisions that have held that where a motion for rehearing is filed with the agency there is no final agency action until rehearing is denied. Pet. 5-6, citing, *inter alia*, *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 541 (1970); *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961); and *Outland* v. *CAB*, 284 F. 2d 224 (D.C. Cir. 1960). It is not apparent that the principle of those cases applies to cases arising under FIFRA, in which the court of appeals perceived a particular congressional concern for prompt resolution of disputes.

However, even if petitioner were correct that the filing of a motion for reconsideration with EPA under the procedural regulations in effect when the current controversy arose should have postponed the time for filing a petition for review in the court of appeals, that argument would be wholly without merit under the procedural regulations that now govern the assessment of civil penalties under FIFRA. These regulations, which replace 40 C.F.R. Part 168 (1979), provide that a motion to reconsider "shall not stay the effective date of the final order unless specifically so ordered by the Administrator." 40 C.F.R. 22.32.[4] In view of

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[4]This Court has recognized that an agency has considerable discretion to determine when administrative procedures have been sufficiently exhausted and agency action is therefore "final" for purposes of judicial review. *Matthews* v. *Eldridge*, 424 U.S. 319, 330 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975). Accordingly, there would appear to be no reason why an agency could not make a determination that, in general, motions for reconsideration do not raise sufficiently

this explicit provision in the current regulations, petitioner's argument about the effect of a motion for reconsideration on the timing of judicial under the superseded procedural regulations implementing FIFRA does not present an issue of current or general importance warranting review by the Court.

b. In any event, it does not appear that petitioner could obtain review in the court of appeals on the merits of the ALJ's decision of September 8, 1978, even if it were correct that a petition for administrative reconsideration ordinarily postpones the time within which judicial review must be sought. As pointed out above, because petitioner did not file an appeal from the ALJ's decision, that decision became the "final order" of the Regional Administrator, without further proceedings, after the expiration of 30 days. See 40 C.F.R. 168.46(c) (1979). Under then-current regulations, a motion for reconsideration had to be filed within 10 days of service of the "final order." 40 C.F.R. 168.70(c) (1979). Yet here, the motion to reconsider was not filed until April 6, 1979, far more than 10 days after the ALJ's decision was served upon petitioner and also far more than 10 days after that decision became final when no administrative appeal was taken from it. As a result, the motion for reconsideration filed on April 6, 1979, could have been timely only insofar as it applied to the Regional Administrator's order of March 19, 1979 denying petitioner's motion to reopen the hearing before the ALJ.[5] And because only a timely motion for reconsideration could postpone the time for filing a petition for judicial review, it follows that the petition for

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meritorious claims to warrant postponement of the effective date of the "final order," while retaining the discretion to postpone that effective date on a case-by-case basis where the need arises. That is what EPA has done in its new regulations.

[5]That order was received by petitioner on March 27, 1979, 10 days before it filed its motion for reconsideration.

judicial review could be timely only as to the Regional Administrator's March 19 order. There can be little doubt that the Regional Administrator did not err in declining to order the ALJ to reopen the proceedings to receive additional evidence about petitioner's relationship with its attorneys in the suspension proceedings: that evidence was not "newly discovered" and could have been presented to the ALJ in the first instance. Therefore, petitioner has not been prejudiced by the court of appeals' dismissal of the petition for review.

4. Finally, even if petitioner were correct that its filing of a motion for reconsideration on April 6, 1979, postponed the time for filing a petition for judicial review until the motion for reconsideration was denied by EPA, the court of appeals nevertheless was without jurisdiction here because petitioner did not file a petition for review in the court of appeals after EPA denied its motion for reconsideration on July 9, 1979. The premise of the cases that have held that a motion for reconsideration filed with the agency postpones the time for seeking judicial review is that until the motion is acted upon, there is no "final" agency action subject to judicial review. *American Farm Lines* v. *Black Ball Freight Service, supra*, 397 U.S. at 541. Thus, under petitioner's theory, its only petition for review, filed in the Tenth Circuit on May 24, 1979, was filed *before* EPA's action was final. It was therefore premature and could not vest jurisdiction in the court of appeals.

Petitioner attempts to avoid this consequence by citing (Pet. 9) cases that have held that a notice of appeal filed in district court before the district court judgment actually becomes final may, in some circumstances, be deemed adequate to take an appeal from the judgment when it later becomes final. It is not clear that cases governing appeals from district courts apply to petitions in the courts of appeals for review of administrative action, which must

take into account the doctrine of exhaustion of administrative remedies. Moreover, by virtue of the 1979 amendments to Fed. R. App. P. 4, the cases relied upon by petitioner are of doubtful validity even as regards appeals from the judgments of district courts. As amended, Rule 4(a)(4) provides that a notice of appeal filed in district court before disposition by the district court of a motion for a new trial or other motion for reconsideration "shall have no effect" and that "[a] new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." By parity of reasoning, the petition for judicial review of EPA's action filed before EPA disposed of petitioner's motion for reconsideration could "have no effect," and a new petition for review therefore had to be filed in the court of appeals within 60 days of EPA's July 9 order denying the motion for reconsideration. Petitioner failed to file a petition for review in the court of appeals after July 9. Accordingly, the court of appeals properly concluded that it was without jurisdiction in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-02

No. 80-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SELCO SUPPLY COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONER IN REPLY

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IN THE

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OCTOBER TERM, 1980

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SELCO SUPPLY COMPANY,

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONER IN REPLY

This is a simple case of procedural injustice, injustice that can be simply cured. Petitioner Selco Supply Company has been denied its day in court by a decision of the Tenth Circuit that the filing of a motion to reconsider a final order of the Environmental Protection Agency ("EPA") does not toll the period within which a notice of appeal of that order must be sought. As Petitioner previously has noted, this ruling flies in the face of contrary holdings of this Court and the other circuits. *See* Pet. at 5-6. Ever since the leading case of *Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir. 1960), it has been a fundamental principle of administrative law that the filing of a motion for reconsideration of an agency order tolls the time for filing a petition for review. Yet the Tenth Circuit justified its departure from this general rule only by an unreasoned conclusion that EPA orders should be "resolved" more quickly than other administrative actions. *See* Pet. App. A at 3a-4a.

Besides denying Petitioner due process in this case, the Tenth Circuit's action leaves in doubt the time period for filing an appeal from any federal agency order. The lower court's opinion gives no guidance as to which other proceedings require such rapid resolution that the time for appeal is not tolled by a motion for reconsideration. It follows that the Tenth Circuit's exception to *Outland* will quickly swallow the rule. Rather than risk forfeiting their appeal, parties will return to the practice of filing a "protective" notice of appeal in all cases in which a reconsideration motion is pending. The consequence will be added expense to the parties and added burden to the courts. Only lawyers will benefit.

The Government attempts to suggest that this case is not appropriate for review by engaging in a torturous and misleading description of the agency proceedings below. However, while the circumstances of the EPA enforcement action may be relevant to a decision on the merits of Petitioner's defense, they are irrelevant to the simple jurisdictional question before this Court—whether a motion for reconsideration tolls the time within which a notice of appeal must be filed.

When the Government actually addresses the Tenth Circuit's holding, it fails to offer any valid reason why the Court should not grant this petition. First and most important, for example, the Government does not explain why the general rule of *Outland* should not apply in this case. It merely restates the conclusory position of the Tenth Circuit, and somewhat tentatively at that, arguing that "[i]t is not apparent that the principle of [*Outland* and its progeny] applies to cases under FIFRA, in which the court of appeals perceived a particular congressional concern for prompt resolution of disputes." Resp. at 8. But, as Petitioner has indicated elsewhere, the court of appeals cited no authority to indicate any such "particular congressional concern." *See* Pet. at 6. Not surprisingly, the government cannot do so either.

Perhaps recognizing that it cannot defend the Tenth Circuit's exception to *Outland*, the Government quickly offers a second argument against review of this case. According to the Government, recent changes in EPA's rules of procedure leave the lower court's holding without "general importance warranting review." Resp. at 9. But this argument is even more lacking than the first. To begin with, any such after-the-fact rule changes would not remedy the previous violation of Petitioner's due process rights. In any event, however, the Government is incorrect, for the EPA amendments are not relevant here. The rule cited by the Government states only that the effective date of final orders will not be stayed pending action on motions for reconsideration unless so ordered by the Administrator. *See* 40 C.F.R. § 22.32 (1980). However, the issuance or denial of a stay does not bear any relationship to the federal jurisdictional question of when an agency order is final for purposes of appellate review. Even if no stay is granted, it is not appropriate for a party to be forced to file a "protective" notice of appeal while a motion for reconsideration is still pending.*

Finally, the Government suggests that even if the Tenth Circuit erred, and even if the amendments to the EPA rules are irrelevant, the instant petition should be denied because Petitioner has not been prejudiced. The Government bases this argument on its claim that the Regional Administrator did not err in his treatment of the complaint against Petitioner. Resp. at 9-10. But this theory is wrong on its face; it is difficult to conceive of

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* It also should be noted that, contrary to the suggestion of the Government, *see* Resp. at 8-9, EPA's procedure with respect to stays is basically the same under both the current rules and the rules as they existed at the time this case was before the Agency. *Compare* 40 C.F.R. § 22.32 (1980) *with* 40 C.F.R. § 168.70 (1979). In an enforcement proceeding such as this one, for example, under either rule a party denied a stay would pay its fine while continuing to challenge the Administrator's decision through a motion for reconsideration.

any more serious prejudice than that resulting from denial of a day in court. The Government essentially is suggesting that the Court should accept the Government's own position on the merits of this case, even though Petitioner never has had the opportunity to present its defense. In other words, the Government is asking this Court to prejudice Petitioner even further. Moreover, it implicitly is asking this Court to leave standing a poor decision of the Tenth Circuit that threatens to increase substantially the administrative burdens on the courts of appeal.

As noted at the outset of this brief, the Tenth Circuit's error can be cured easily—and without oral argument. The Court need only remand the case to the Tenth Circuit with instructions to hear Petitioner's appeal pursuant to *Outland*. This simple action at long last would give Petitioner the opportunity to have a hearing on the underlying substantive issues in this case. Alternatively, Petitioner respectfully requests that the Court grant the petition for certiorari and hear argument in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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